FILED
DEC 19 1996

No. 96-890

In the Supreme Court of the United States

OCTOBER TERM, 1996

BETTY-LOUISE FELTON, ET AL., CROSS-PETITIONERS

v.

RACHEL AGOSTINI, ET AL.

ON CROSS-PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE SECRETARY OF EDUCATION IN OPPOSITION

WALTER DELLINGER
Acting Solicitor General
FRANK W. HUNGER
Assistant Attorney General
STEPHEN W. PRESTON
Deputy Assistant Attorney General
MICHAEL JAY SINGER
HOWARD S. SCHER
Attorneys
Department of Justice
Washington, D.C. 20530-0001
(202) 514-2217

QUESTION PRESENTED

Whether this case presents an appropriate occasion for reconsidering the Court's decision in *Aguilar* v. *Felton*, 473 U.S. 402 (1985).

TABLE OF CONTENTS

	Page
Opinions below	1
Jurisdiction	1
Statement	2
Argument	5
Conclusion	9
Appendix	1a

TABLE OF AUTHORITIES

Cases:

Aguilar v. *Felton*, 473 U.S. 402 (1985)	2, 3, 5, 8
Board of Education of Kiryas Joel School District v. *Grumet*, 512 U.S. 687 (1994)	3
Chevron U.S.A. Inc. v. *Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984)	7
Dayton Board of Educ. v. *Brinkman*, 433 U.S. 409 (1977)	5
Thigpen v. *Roberts*, 468 U.S. 27 (1984)	5
Vance v. *Terrazas*, 444 U.S. 252 (1980)	6

Constitution, statutes, regulation, and rules:

U.S. Const. Amend. I (Establishment Clause)	2
Augustus F. Hawkins-Robert T. Stafford Elementary and Secondary School Improvement Amendments of 1988, Pub. L. No. 100-297, 102 Stat. 130:	
§ 1003(a), 102 Stat. 293	2
§ 6303(a), 102 Stat. 431	2
Education Amendments of 1978, Pub. L. No. 95-561, § 133, 92 Stat. 2176	7
Education Consolidation and Improvement Act, Pub. L. No. 97-35, Tit. V, Subtit. D, 95 Stat. 464	2
Education Consolidation and Improvement Act of 1981 Amendments, Pub. L. No. 98-211, § 3, 97 Stat. 1414	7

Statutes, regulation, and rules—Continued: Page

Elementary and Secondary Education Act of 1965, Tit. I, 20 U.S.C. 6301 *et seq.* 2, 6, 7, 8
20 U.S.C. 6314 6
20 U.S.C. 6321(a)(2) 7
20 U.S.C. 6321(c) 7
Improving America's Schools Act of 1994, Pub. L. No. 103-382, § 101, 108 Stat. 3519 2
20 U.S.C. 2753 (1978) 7
34 C.F.R. 200.12(b) 6-7
Fed. R. Civ. P. 60(b) 3, 4, 5
Sup. Ct. R. 14.1(a) 6

In the Supreme Court of the United States

OCTOBER TERM, 1996

No. 96-890

BETTY-LOUISE FELTON, ET AL., CROSS-PETITIONERS

v.

RACHEL AGOSTINI, ET AL.

ON CROSS-PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE SECRETARY OF EDUCATION IN OPPOSITION

OPINIONS BELOW

The opinions of the court of appeals (Pet. App. 11a-13a)[1] and the district court (Pet. App. 1a-10a) are unreported.

JURISDICTION

The judgment of the court of appeals was entered on August 30, 1996. Petitions for a writ of certiorari in Nos. 96-552 and 96-553 were filed on October 7, 1996. The cross-petition for a writ of certiorari was filed on November 26, 1996. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

[1] Unless otherwise indicated, "Pet. App." refers to the appendix to the petition for a writ of certiorari in No. 96-552.

STATEMENT

1. As we have explained in our response to the petitions for a writ of certiorari filed in Nos. 96-552 and 96-553, this case involves a federal program to provide remedial instruction and support services to needy elementary and secondary school students, known as the "Title I program."[2] See 20 U.S.C. 6301 *et seq.*

In 1978, six plaintiffs brought this action to challenge, as violative of the Establishment Clause of the First Amendment, the use of Title I funds to pay the salaries of public school teachers providing remedial instruction to students inside parochial schools. This Court held that such use of Title I funds did violate the Establishment Clause. *Aguilar* v. *Felton*, 473 U.S. 402 (1985). The Court concluded that the public school system's supervisory efforts to ensure that the instruction retained a purely secular content "inevitably results in the excessive entanglement of

---

[2] The program at issue was originally known as "Title I," because it was first enacted as Title I of the Elementary and Secondary Education Act of 1965. In 1981, Congress enacted Chapter 1 of the Education Consolidation and Improvement Act, Pub. L. No. 97-35, Tit. V, Subtit. D, 95 Stat. 464, as a continuation of Title I, and the program became known as "Chapter 1." See *Aguilar* v. *Felton*, 473 U.S. 402, 404 n.1 (1985) (discussing the program's earlier history). In 1988, Congress enacted a new version of the program in the Augustus F. Hawkins-Robert T. Stafford Elementary and Secondary School Improvement Amendments of 1988, Pub. L. No. 100-297, §§ 1003(a), 6303(a), 102 Stat. 293, 431. Effective July 1, 1995, the Chapter 1 program again became known as "Title I," pursuant to the Improving America's Schools Act of 1994, Pub. L. No. 103-382, § 101, 108 Stat. 3519. The most recent legislation made substantive changes in the program, but none of those changes substantially affects the issues in this case.

church and state," 473 U.S. at 409, because "[a]gents of the city must visit and inspect the religious school regularly, alert for the subtle or overt pressure of religious matter in Title I classes," and "the religious school must obey these same agents when they make determinations as to what is and what is not a 'religious symbol' and thus off limits in a Title I classroom." *Id.* at 413.

On remand from this Court, the district court entered an injunction prohibiting the Secretary of Education and the Chancellor of the Board of Education of the City of New York from using public funds for any Title I program, to the extent that such use authorizes instructional and counseling services inside religious schools. Pet. App. 14a-16a.

2. In October and December 1995, petitioners in Nos. 96-552 and 96-553 filed motions pursuant to Federal Rule of Civil Procedure 60(b) for relief from the injunction entered by the district court on remand from this Court. The district court denied the motions. Pet. App. 1a-10a.

The district court first ruled that a Rule 60(b) motion was a proper mechanism for petitioners to present their request for relief from the injunction. Pet. App. 7a-10a. The court acknowledged that "Rule 60(b) may not be used as a substitute for appeal," but it found it "plain" that, in this case, a Rule 60(b) motion "does not offend that rule." Pet. App. 7a. Then, after quoting the separate views of several Justices in *Board of Education of Kiryas Joel School District* v. *Grumet*, 512 U.S. 687 (1994), regarding this Court's decision in *Aguilar*, the district court noted that "it is at least unusual, if not extraordinary, that the losing parties to a Supreme Court case can point to such promising indicia that they would win the

case now." Pet. App. 7a-8a. The district court concluded that, in such extraordinary circumstances, allowing petitioners "to resuscitate pursuant to Rule 60(b) the issue they lost in 1985 strikes the proper balance between the conflicting principles that litigation should have finality and that justice should be done." *Id.* at 7a-8a.

Addressing the "law of the case" doctrine, the district court noted that courts may depart from that rule for a "compelling reason" such as an "intervening change of law." Pet. App. 8a. The court thus accepted that, if petitioners were able to show "a sea change in the law" since this Court's decision in *Aguilar*, the law of the case doctrine would not preclude relief under Rule 60(b). *Ibid.* The court found further that the motion was not untimely, and that the plaintiffs who brought the original action would not suffer any cognizable prejudice as a result of any delay in bringing the Rule 60(b) motion. Pet. App. 8a-9a. The court expressly found that a motion for relief from the injunction was "far preferable" to requiring the school district to challenge the judgment by placing itself in contempt by disobeying the injunction. *Id.* at 9a.

Ultimately, however, the district court declined to afford petitioners relief from the judgment. The court observed that "[t]here may be good reason to conclude that [*Aguilar*'s] demise is imminent, but it has not yet occurred." Pet. App. 10a. The court also found it doubtful that it could anticipate any decision by this Court to reverse its own decision in this case. *Ibid.* The district court suggested, however, that "there could scarcely be a more appropriate vehicle for that review than the same case in which, eleven years later, the same school board is struggling with

the consequences of the Supreme Court's decision." *Ibid.*

The court of appeals affirmed, in a summary order, for "substantially the [same] reasons" as those stated in the district court's decision. Pet. App. 13a.

ARGUMENT

1. Cross-petitioners argue that the Court should grant the cross-petition to decide whether the lower courts erred in concluding that a motion filed under Federal Rule of Civil Procedure 60(b) was the proper method to present the request for relief from the injunction entered by the district court on remand from this Court in *Aguilar* v. *Felton*, 473 U.S. 402 (1985). Cross-Pet. 6. Although we agree that that issue warrants review by this Court, in conjunction with the question whether *Aguilar* should be reconsidered on its merits, granting the cross-petition is not necessary for the Court to reach the issue.

The cross-petitioners' argument that this case is an unsuitable vehicle for reconsideration of *Aguilar*, if accepted by the Court, would be an alternative basis for affirming the judgment of the court of appeals. Moreover, that argument was presented in the courts below by the cross-petitioners in opposition to the motions under Rule 60(b), and it was also raised as an argument in opposition to the petitions for a writ of certiorari in Nos. 96-552 and 96-553. See 96-552 Resp. Br. in Opp. 12. Accordingly, the cross-petitioners would be free to present that argument in the briefing on the merits in No. 96-552 or No. 96-553, should the Court grant the petition for a writ of certiorari in either case. See, *e.g.*, *Thigpen* v. *Roberts*, 468 U.S. 27, 32 (1984); *Dayton Board of Educ.* v. *Brinkman*, 433 U.S. 409, 419 (1977).

Furthermore, the question presented by the cross-petition is "fairly included" within the questions presented in the petitions in Nos. 96-552 and 96-553. See Sup. Ct. R. 14.1(a) The question presented by those petitions—whether the Court "should overrule" its decision in *Aguilar* (see 96-552 Pet. I)—is broad enough to include the question whether the Court should do so in this particular case. Where, as here, a question of law is a "predicate to intelligent resolution" of the question presented, it is "fairly included" within the question presented. *Vance* v. *Terrazas*, 444 U.S. 252, 258-259 n.5 (1980).[3]

2. The cross-petition makes two additional points that warrant response.

a. Cross-petitioners argue (Cross-Pet. 21-24) that Title I funds may be used for schoolwide programs, see 20 U.S.C. 6314, and that religious schools' use of Title I funds for schoolwide programs would violate the Establishment Clause. The Department of Education's current regulations and guidance make clear, however, that religious (and other private) schools may not participate in the schoolwide-improvement provisions of Title I. The relevant regulation, 34 C.F.R. 200.12(b), provides:

> An LEA [local educational agency] shall use funds under this subpart to meet the special educational needs of participating private school children, but not for—
>
> (1) The needs of the private school; or

---

[3] Notwithstanding the foregoing, we would not oppose granting the cross-petition, should the Court have doubt whether the issue presented could be addressed on review of the petitions in Nos. 96-552 and 96-553.

(2) The general needs of children in the private school.

Similarly, the Department's current policy guidance on the Title I program states that, "[b]ecause private schools are not eligible for Title I services [only their eligible children are], schoolwide programs may not be operated in private schools." See App., *infra*, 2a. See also 20 U.S.C. 6321(a)(2) (Title I services for students in private schools must be secular); 20 U.S.C. 6321(c) (Title I funds must remain under control of a public agency when used for benefit of students in private schools). Because the Department of Education is the federal agency charged with the administration of Title I, its regulations are entitled to deference. *Chevron U.S.A. Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984).

Cross-petitioners are mistaken in suggesting that there were no such provisions for schoolwide-improvement programs in the Title I statute under which the plan in question in *Aguilar* was developed. Cross-Pet. 24. Although the original Title I statute enacted in 1965 did not contain such authority, a provision on schoolwide projects was added to the statute in 1978 (see 20 U.S.C. 2753 (1978); Education Amendments of 1978, Pub. L. No. 95-561, § 133, 92 Stat. 2176), and was in effect at the time of this Court's decision in *Aguilar* (see Pub. L. No. 98-211, § 3, 97 Stat. 1414 (1983)). We are informed by the Department of Education, however, that it never permitted religious schools to take advantage of the schoolwide-improvement provisions of the Title I statute under review in *Aguilar*.

b. Cross-petitioners also argue (Cross-Pet. 24-25) that the current record is inadequate because

the so-called "push-in" program permitted in public schools—under which a "[Title] I teacher together with the regular classroom teacher provides instruction to the entire class" (Cross-Pet. 24)—presents concerns different from those at issue in the *Aguilar* decision and creates constitutional problems not presented earlier in this case. As far as we are aware, however, no plan for such a "push-in" program in religious schools has ever been submitted by the City of New York to the Department of Education, or submitted to the City by a religious school. See 96-553 Reply Br. 5-6.[4] The concern raised by cross-petitioners based on the "push-in" program, therefore, is entirely speculative, and does not counsel against this Court's reconsideration of its decision in *Aguilar*.

---

[4] Even before this Court's decision in *Aguilar*, the City of New York required that Title I instructors be insulated from any religious influence by the school in which the instruction was taking place. The City required that "the administrators of the parochial schools * * * clear the classrooms used by the public school personnel of all religious symbols," and that "[t]he professionals involved in the program * * * avoid involvement with religious activities that are conducted within the private schools." 473 U.S. at 407. To ensure that no religious education could occur during Title I class time, only "remedial reading, reading skills, remedial mathematics, English as a second language, and guidance services" were to be provided by Title I personnel (*id.* at 406), and Title I personnel were required "to bar religious materials in their classrooms" (*id.* at 407).

CONCLUSION

The cross-petition for a writ of certiorari should be denied.

Respectfully submitted.

WALTER DELLINGER
Acting Solicitor General
FRANK W. HUNGER
Assistant Attorney General
STEPHEN W. PRESTON
Deputy Assistant Attorney General
MICHAEL JAY SINGER
HOWARD S. SCHER
Attorneys

DECEMBER 1996

APPENDIX

TITLE I, PART A
POLICY GUIDANCE

IMPROVING BASIC PROGRAMS OPERATED BY LOCAL EDUCATIONAL AGENCIES

[SEAL OMITTED]

U.S. DEPARTMENT OF EDUCATION
Office of Elementary and Secondary Education
Compensatory Education Programs

April 1996

* * * * *

PROVIDING SERVICES TO ELIGIBLE PRIVATE SCHOOL CHILDREN

* * * * *

[p. 13]

Q5. If a school in the attendance area in which eligible private school students reside is operating a schoolwide program, are private school students to be offered a schoolwide program?

A. No. Because private schools are not eligible for Title I services, schoolwide programs may not be operated in private schools. However, eligible private school children residing in an area served by a schoolwide program school must be offered equitable services.

Q6. May an LEA provide services to private school children that are not equitable to those provided to public school children, if, after receiving an offer of equitable services, the private school officials or parents choose to have the children participate in only some of the services?

A. The statute requires that an LEA offer equitable services to private school children; it does not require that private school children accept or participate in all those services. If private school officials or parents choose to have their children participate in only some of those services, and decline participation in others, the LEA will have met its responsibility by providing those services in which private school children wish to participate. LEAs should continue to offer equitable services in future years, however, rather than offering only those services in which children participated in the past.

Q7. When a child residing in a Title I attendance area in one LEA attends a private school in another LEA, which LEA, if any, is responsible for serving the child?

A. The LEA in which the child resides is responsible to provide services for the child. The LEA may,

however, arrange to have services provided by another LEA, reimbursing that LEA for costs.

Q8. May an LEA establish a minimum number of private school children selected for the program in order to establish a Title I program near the private school? If so, what is the LEA's responsibility to serve children attending private schools with fewer than that minimum number?

A. Section 1120(a) of Title I requires that LEAs provide for the participation, on an equitable basis, of eligible children enrolled in private schools. The requirement applies regardless of the number of children attending a private school. However, when the number of eligible children at one location is very small, the cost of establishing certain types of programs to serve them may be prohibitive, especially when these children may be from several grades or have different educational needs. In this case, other options should be considered. For instance, if it is feasible and equitable, LEAs may adopt methods, such as take-home computer programs, individual tutoring programs, or professional development activities.

* * * * *